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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LOUIS CASTELLANOS,

Defendant and Appellant.

B198779

(Los Angeles County  
Super. Ct. No. VA095019)

APPEAL from a judgment of the Superior Court of Los Angeles County. John Torribio, Judge. Affirmed as modified.

Melissa J. Kim, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Theresa A. Patterson and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Jose Louis Castellanos appeals from the judgment entered following a jury trial that resulted in his conviction of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a).) He contends the trial court erred in: (1) denying his *Pitchess* motion as to one of two officers; and (2) excluding evidence of a statement appellant made to police.<sup>1</sup> The People contend the trial court erred in failing to impose certain mandatory fines and surcharges. We modify the judgment to include certain mandatory fines, remand to the trial court for consideration of a discretionary fine and otherwise affirm the judgment.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Viewed in accordance with the usual rules on appeal (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), the evidence established defendant had no identification with him when he was stopped for a traffic violation at about 11:55 p.m. on Sunday, April 23, 2006, in the parking lot of the Fiesta Inn, by City of Bell Gardens police officer Paul Camacho. Upon ascertaining that there was an outstanding arrest warrant for a person with defendant's name, Camacho arrested defendant and the passenger in defendant's car.<sup>2</sup> Maintaining that he was not the subject of any arrest warrant, defendant urged Camacho to check his driver's license, which was in his hotel room.

Officer Camacho testified that, before defendant gave consent to officers to enter his room, defendant told them that he was concerned about something they might find in the room. Camacho, Sergeant Ruben Musquiz, and defendant entered the room. In plain view on top of the refrigerator, Camacho saw the kind of glass pipe used to smoke methamphetamine. From the bathroom counter, Musquiz recovered a plastic baggie containing what was later identified as 3.39 grams of a substance containing a useable amount of methamphetamine.

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<sup>1</sup> *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

<sup>2</sup> It was later determined that the warrant was not for defendant.

Defendant testified that he gave the officers permission to go into the room to find his license because he believed it would prove that he was not the person named in the outstanding arrest warrant. Before the officers went into the room, defendant told them there was a crack pipe on top of the refrigerator, left there by a woman who had stayed with defendant the night before. Contrary to the officers' testimony that there was nothing in the room to indicate a female occupant, defendant testified that there were female underclothes belonging to this woman in a drawer. Defendant maintained that the pipe and methamphetamine found in the room did not belong to him, so it must have belonged to this woman, because they were the only two people who stayed in the room.

## DISCUSSION

### A. *The Trial Court Did Not Abuse Its Discretion In Denying Pitchess Discovery as to Sergeant Musquiz*

Defendant contends the trial court abused its discretion when it denied defendant's *Pitchess* motion as to Sergeant Musquiz (although it granted the motion as to Officer Camacho). He argues that Musquiz's credibility was at issue because Musquiz found the narcotics.

In response to a *Pitchess* motion, the trial court screens law enforcement personnel files in camera for evidence that may be relevant to a criminal defendant's defense. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1225 (*Mooc*).) The statutory scheme seeks to balance the defendant's right to discovery of records pertinent to the defense with the peace officer's reasonable expectation that the officer's personnel records will remain confidential. (See Pen. Code, §§ 832.5, 832.7, 832.8; Evid. Code, §§ 1043-1047.) An affidavit submitted in support of a *Pitchess* motion must "describe a factual scenario supporting the claimed officer misconduct." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1024 (*Warrick* ).) "[T]o obtain in-chambers review a defendant need only demonstrate that the scenario of alleged officer misconduct could or might have occurred." (*Id.* at p. 1016.) The denial of a police officer's version of events may be sufficient to meet this low standard. (*Id.* at pp. 1024-1025.) The Supreme Court has

emphasized that the threshold showing of good cause required to obtain *Pitchess* discovery is “relatively low.” (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83, 94; accord, *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 70.)

We review the trial court’s ruling on a motion for access to law enforcement personnel records for abuse of discretion. (*People v. Hughes* (2002) 27 Cal.4th 287, 330.)

Here, defendant’s *Pitchess* motion sought: “(1) [contact information] of all persons who were witnesses against, or filed complaints against [Camacho and Musquiz] relating to acts of dishonesty, fabrication of probable cause, and/or falsification of police reports, as well as the dates of the filing of such complaints. [¶] (2) Disclosure of the discipline imposed upon the named officers as a result of an Investigating Department’s investigation of any complaint described in item one above.”

Although the motion sought discovery of information as to both Officer Camacho and Sergeant Musquiz, the good cause alleged in the motion related only to Camacho: “The defendant asserts that Officer Paul Camacho #500 has falsified the police report and testified falsely in this matter. Specifically, defendant having been confronted with his alleged statement that he had voluntarily gave officer Camacho or [Sergeant] Musquiz consent to search [his hotel room], indicated that the officer is lying when he reports that he consented [to] the officer(s) to enter this room and retrieve his California Driver’s License [CDL], thus finding in plain view the narcotics for which he is charged of being in possession.” (Boldface omitted.) Attached as an exhibit to the *Pitchess* motion was Camacho’s arrest report, which states: “I asked [defendant] for consent to enter his room and retrieve his CDL. [Defendant] agreed, [h]owever, he stated that his girlfriend left a ‘meth pipe’ inside and that he was concerned about that. . . . I told [defendant] that without verifying his true identity he was going to be booked on the warrant because his information was on the warrant. [¶] [Defendant] agreed to let me inside his room and retrieve his CDL. [¶] [Defendant], Sergeant Musquiz, and I entered [the room]. Once inside, [defendant] said his wallet was on the bed. In [defendant’s] presence I searched the bed. However, I could not locate his wallet. [Defendant] instructed me to look for

his wallet in the room. While searching for his wallet, in plain view, I saw a glass pipe with burnt residue on top of the refrigerator. Shortly thereafter, Sergeant Musquiz, in plain view, located a large plastic baggy containing a crystal like substance resembling Methamphetamine on top of the bathroom counter top. . . .”

The trial court granted the motion in part, ordering “discovery regarding Officer Camacho as to moral turpitude and false reports only.” Following an in camera review, it ordered one item disclosed to the prosecutor and defense counsel.<sup>3</sup>

Inasmuch as the only “factual scenario supporting the claimed officer misconduct” (*Warrick, supra*, 35 Cal.4th at p. 1024), alleged in the motion related to Officer Camacho and not Sergeant Musquiz, the trial court did not abuse its discretion in limiting *Pitchess* discovery to Camacho. That Camacho’s police report recited that Musquiz found the narcotics on the bathroom counter was not sufficient to establish good cause as to Musquiz where the affidavit did not allege any factual scenario of misconduct by Musquiz.

#### B. *Exclusion of Defendant’s Statement to Officer Camacho Was Harmless*

Defendant contends the trial court abused its discretion in sustaining hearsay objections to questions intended to elicit Officer Camacho’s testimony that before giving consent to search his hotel room, defendant warned the officers that they would find a meth pipe belonging to a woman who had stayed in the room with defendant the night before. Defendant argues that even if the statement were hearsay, it was admissible because it was offered to complete part of a statement already received into evidence (Evid. Code, § 356) and was a prior consistent statement (Evid. Code, §§ 791, 1236). As we shall explain, even assuming one or both of these exceptions to the hearsay rule

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<sup>3</sup> At defendant’s request and pursuant to *Mooc, supra*, 26 Cal.4th at page 1229, we have reviewed the reporter’s transcript of the trial court’s in camera review of defendant’s personnel package and find the trial court properly concluded that there was just one discoverable item.

applied, the error in excluding this evidence was patently harmless under the circumstances.

### 1. The Excluded Evidence

During cross-examination of Officer Camacho, defense counsel asked: “Now did he tell you that there would be a meth pipe inside of the room?” Before Camacho answered, the trial court sustained its own hearsay objection to the question. The trial court explained: “I’m not going to allow you to introduce his statements which tend to exonerate him or show a prompted denial as the People have the right to cross-examination. So I’ll leave this witness on call. If your witness is going to testify to that, you may then ask him at a later time to corroborate your client’s statement. But at this point it’s a denial of the People’s fundamental right to cross-examination.”

Later, defendant testified that before the officers went into his room, he was concerned that the officers would find a crack pipe that he knew was in the room. Defendant explained: “I had a girl over and she had like a crack pipe and it was on top of the refrigerator. I mentioned it to [Camacho] to warn him.”

Defense counsel recalled Officer Camacho, but the trial court sustained the prosecutor’s hearsay objections to the following questions: “Did [defendant] not also tell you that his girlfriend left a meth pipe inside and he was concerned about that?” and “Did you ask him if [the meth pipe] was his?” Camacho was allowed to testify that defendant told the officers that he was concerned about something in the room that they were “to look out for.”

During closing argument, there was no dispute that defendant told Officer Camacho that the officers would find a meth pipe in his hotel room, left there by a woman. The prosecutor posited that defendant did so because he wanted the officers to retrieve his identification from the hotel room so that he would not be taken to jail on the warrant, but he did not want to acknowledge that the pipe and methamphetamine they would also find in the room belonged to him. Defense counsel argued that a reasonable inference from defendant’s statement to Camacho is that defendant knew the woman had

left the meth pipe, but he did not know about the methamphetamine and therefore the methamphetamine was not his.

## 2. Evidence Code Section 356

Evidence Code section 356 provides that, where part of a conversation “is given in evidence by one party, *the whole on the same subject* may be inquired into by an adverse party.” (Italics added.) Here, the People are correct that defendant’s conversation with Officer Camacho about a woman leaving a pipe in his hotel room was not on the same subject as the other statements he made to Camacho concerning his identity and the location of his driver’s license. But once the trial court allowed Camacho to testify that defendant warned him about something the officers might find in the room, defendant’s statement became admissible under Evidence Code section 356 because it was on the same subject – what the officers would find in the room.

## 3. Evidence Code Section 1236

Evidence Code section 1236 provides: “Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791.” Evidence Code section 791 provides: “Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.” Absent an express or implied charge that a witness’s trial testimony is recently fabricated or influenced by bias or improper motive,

evidence of a prior consistent statement is not admissible. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219, fn. 6; *People v. Frye* (1985) 166 Cal.App.3d 941, 950.)

Here, defendant's statement to Officer Camacho about the woman leaving the pipe in his hotel room was consistent with his trial testimony to the same effect. Camacho was allowed to testify that defendant warned him of something he might find in the hotel room, but prevented from specifying that what defendant warned Camacho of was a meth pipe left in the room by a woman. Notwithstanding the fact that Camacho did not deny defendant told him about the meth pipe, the jury may have inferred that defendant fabricated the story about the woman for trial from the fact that Camacho did not confirm that defendant told the officers about the meth pipe before they entered his hotel room. Because there was an implied charge that defendant was fabricating the claim, the evidence was admissible under Evidence Code section 1236.

#### 4. Harmless Error

The error in excluding this evidence was harmless. This is because defendant's testimony that he told the officers they would find a pipe belonging to a woman in his room was not contradicted. On the contrary, the prosecutor argued to the jury that the evidence that defendant told the officers about the meth pipe before they entered the room supported the prosecution's theory of the case. Accordingly, a different result was not reasonably probable had the excluded evidence been admitted; i.e., had Officer Camacho been allowed to testify that defendant told the officers about the meth pipe before they entered his hotel room. (Evid. Code, § 354; cf. *People v. Koontz* (2002) 27 Cal.4th 1041, 1077 [error in excluding evidence harmless, citing *People v. Watson* (1956) 46 Cal.2d 818, 836].)

#### *C. The Trial Court Failed to Impose Certain Mandatory Penalty Assessments, Fees, and Surcharges*

The People contend the trial court erred in failing to impose the following: (1) a \$35 county penalty pursuant to Government Code section 76000; (2) a \$15 state



court construction penalty pursuant to Government Code section 70372; and (3) a \$10 state surcharge pursuant to Penal Code section 1465.7. Defendant does not dispute that the Government Code section 76000 and Penal Code section 1465.7 fines are mandatory, but argues that because the trial court had discretion to waive the Government Code section 70372 fine inasmuch as he was sentenced to state prison (Gov. Code, § 70372, subd. (e)), the matter should be remanded to the trial court for exercise of that discretion. We disagree.

We agree that in the proper setting a trial court has discretion to waive the state construction penalty. At this stage of the proceedings, the penalty is mandatory as the initial operative language of the statute states that the court construction penalty “shall be levied.” (Gov. Code, § 70372, subd. (a)(1).) If at some future time, defendant believes he is entitled to ask the trial court to waive the penalty, he may do so under Government Code section 70372, subdivision (e). In order to be eligible for a waiver, the statute appears to require defendant to (1) be “in [state] prison until the fine is satisfied,” and (2) demonstrate personal or family hardship. (*Id.*, subd. (e).) Defendant has made no such showing in the trial court and, unless and until he does, the mandatory construction penalty shall remain imposed.

### **DISPOSITION**

The judgment is modified to reflect imposition of a county penalty assessment of \$35 (Gov. Code, § 76000), a 20 percent state surcharge of \$10 (Pen. Code, § 1465.7), and a state court construction penalty of \$30. The trial court shall prepare a new abstract of judgment that includes these amounts and forward a certified copy to the Department of

Corrections. In all other aspects, the judgment is affirmed.

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RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.